EXHIBIT H

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAKE WILLIAM JEWELL,

Defendant-Appellant.

UNPUBLISHED
April 22, 2010

No. 288442
Jackson Circuit Court
LC No. 07-004839-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

I. FACTS AND PROCEEDINGS

Defendant was originally tried for three felonies, larceny of a firearm, MCL 750.357b; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was also tried for two misdemeanors, breaking and entering of a motor vehicle to steal property worth more than $200 but less than $1,000, MCL 750.356a(2)(b)(i); and larceny of more than $200 but less than $1,000, MCL 750.356(4)(a). All these charges stem from a theft of $160, a 22-caliber revolver, and a hunting knife from William Kesterson's truck on December 4, 2007. On February 27, 2008, the jury convicted defendant of the misdemeanors; however, the jury did not reach a verdict on the felonies. Defendant was subsequently retried on the felonies. On August 15, 2008, following the second jury trial, defendant was convicted of felon-in-possession, but acquitted of the other felonies. Defendant was sentenced to 34 to 120 months' imprisonment for his felony conviction, and to 210 days in jail for each of his misdemeanor convictions.

Defendant appeals and we affirm.

II. SUFFICIENCY OF THE EVIDENCE

Defendant appeals on the ground of sufficiency of the evidence, and advances a vague challenge to the identity element, as well as a challenge to the possession element of his felon-in-possession conviction in the context of an aiding and abetting theory. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution

to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Identity may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Here, William's son, Michael Kesterson, observed an individual fleeing from his property into an adjacent wooded area. Michael called his neighbor, Bruce Hildenbrand, and provided a description of the individual and told him that the individual was heading towards the nearby mobile home park. Hildenbrand observed an individual, who matched the suspect's description, walking down a nearby road and approaching a residence. At trial, Hildenbrand identified the suspect as defendant. The police subsequently arrested defendant, and located William's knife and a pair of binoculars inside an inoperable car in front of the residence where defendant had been hiding. Trial testimony established that these binoculars belonged to defendant. The police also located defendant's Blackberry clipped to some brush near Michael's property. A track by the police canine unit led the police into the wooded area adjacent to Michael's property and to the mobile home park, where defendant resided. We defer to the jury's credibility decisions regarding witness identification testimony, *People v Edwards*, 55 Mich App 256, 259-260; 222 NW2d 203 (1974), and resolve conflicts regarding the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Ultimately, we will not interfere with the jury's role of determining the credibility of witnesses or the weight of the evidence, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005), and we find that there is sufficient circumstantial evidence to establish defendant's identity as the robber. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); *Kern, supra* at 409-410.

The elements of felon-in-possession are that: (1) defendant possessed a firearm, (2) defendant had been convicted of a prior specified felony, and (3) less than five years had elapsed since defendant was discharged from parole for the previous felony. MCL 750.224f. The latter two elements are not disputed. "The term 'possession' includes both actual and constructive possession . . . a person has constructive possession if there is proximity to the article together with indicia of control." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989) (citation omitted). "Possession may be proven by circumstantial as well as direct evidence." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

The only evidence regarding the firearm was William's testimony that he always kept a handgun with him in an old shaving kit, and that he left the kit with the handgun therein in his truck on the day in question. He testified that his handgun was one of the items missing from the truck. There was a great deal of circumstantial evidence that defendant stole the items from the truck. He matched the description of the suspect observed fleeing from Michael's property, his Blackberry was located near Michael's property, he was located in the vicinity of Michael's property shortly after the incident occurred, and William's knife was recovered at the scene where the police arrested defendant. The jury could have accepted or rejected the circumstantial evidence that defendant stole William's items, and, as such, that he was in actual possession of a firearm in violation of MCL 750.224f. *Burgenmeyer, supra* at 438. See also *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) ("Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime."). And,

in fact, the jury convicted defendant of this offense. We will not interfere with the jury's role of determining the credibility of witnesses or the weight of the evidence. *Williams, supra* at 419. Importantly, we note that the fact that the jury acquitted defendant of the other felonies has no bearing on whether the jury found him guilty of felon in possession. See *People v Torres*, 452 Mich 43, 75; 549 NW2d 540 (1996) (a jury in a criminal case may reach an inconsistent verdict as part of its power of leniency). We affirm defendant's conviction.

In doing so, we acknowledge that defendant argues that there was insufficient evidence to establish the possession element under an aiding and abetting theory. However, there is no record support that the jury convicted defendant of felon in possession under such a theory. The trial court only provided an aider and abettor instruction in conjunction with the charge of larceny of a firearm, and not with the felon-in-possession or felony-firearm charges. Jurors are presumed to follow a trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution established the element of possession beyond a reasonable doubt. *McGhee, supra* at 622. Because we reach this conclusion, we need not address defendant's challenge to the possession element in the context of an aiding and abetting theory.

We note that defendant does not expressly challenge the sufficiency of the evidence of his misdemeanor convictions on appeal.[1] "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Viewing the evidence in the light most favorable to the prosecution, we find that a rational jury could find beyond a reasonable doubt that the prosecution established all of the elements of the aforementioned misdemeanors. *McGhee, supra* at 622.

III. DUE PROCESS

Defendant says that the trial judge denied his constitutional right to due process by allowing him to be kept in shackles visible to the jury for the duration of jury selection and preliminary instruction. Unpreserved allegations of error are reviewed for plain error affecting the defendant's substantial rights. *Carines, supra* at 764-765.

Generally, a criminal defendant has the right to be free of shackles or handcuffs in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). Here, before the jury pool entered at the beginning of the trial, defense counsel informed the trial court that defendant was still in shackles and leg irons. The trial court responded: "I can hardly see them

[1] The elements of breaking and entering of a motor vehicle to steal property worth more than $200 but less than $1,000 are: (1) entering or breaking a motor vehicle, (2) stealing or unlawfully removing property, and (3) such property is worth more than $200 but less than $1,000. MCL 750.356a(2)(b)(i). The elements of larceny of more than $200 but less than $1,000 are: (1) committing larceny by stealing property, and (2) and such property is worth more than $200 but less than $1,000. MCL 750.356(4)(a).

from where you're sitting. [Defense counsel], go over to that jury box over there." The record reflects that defense counsel made no further inquiry about shackles until after the jury was selected. Defense counsel then asserted: "Your Honor, I would like to make one more request with respect to my client's shackles. You can see them from the jury box and I would just like to bring it to the attention of the Court and ask you to make a ruling relative to that." The trial court granted the request, and defendant was unshackled. Defendant should not be permitted to take advantage of an alleged error that could have been addressed before jury selection commenced, and that defense counsel only sought to revisit after the jury had been selected. See *People v Breeding*, 284 Mich App 471, 486; 772 NW2d 810 (2009) ("A defendant should not be allowed to assign error to something that his own counsel deemed proper."). "To do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Further, because the record does not indicate that any member of the jury actually saw the defendant in leg irons and because the trial court was not requested to give a cautionary instruction, we find no error requiring reversal. *People v Marsh*, 108 Mich App 659, 678; 311 NW2d 130 (1981).

V. CREDIT FOR TIME SERVED

Also, defendant contends that the trial court improperly denied him credit for time served in jail pending his trial and sentencing. Defendant says this denial deprived him of certain constitutional protections. This issue is waived. Defendant moved the trial court for resentencing, asserting that he was entitled to credit 297 days for time served in jail pending trial. However, the parties subsequently entered into a stipulation, which denied defendant's request for credit for time served. Waiver is the intentional relinquishment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Where an issue is waived, appellant may not seek appellate review of the claimed error because his waiver extinguished any error. *Id.*

Defendant further contends that he is entitled to credit on his misdemeanor sentences, because the consecutive sentencing mandate of MCL 768.7a(2) does not apply to new misdemeanor convictions. Defendant waived this issue by stipulating to the order dismissing his motion for resentencing, thereby precluding appellate review. *Carter, supra* at 215.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

EXHIBIT I

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY DOWELL BAILEY,

Defendant-Appellant.

UNPUBLISHED
August 6, 2009

No. 283854
Ionia Circuit Court
LC No. 07-013548-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of being an inmate in possession of a weapon in violation of MCL 800.283(4). The trial court sentenced defendant as a habitual offender to 60 to 180 months in prison. Because we conclude that the trial court erred when it ordered defendant to be shackled and this error prejudiced defendant's trial, we reverse and remand for a new trial.

Generally, a trial court's decision to shackle a defendant is reviewed for an abuse of discretion under the totality of the circumstances. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). To warrant reversal, the defendant must show that his appearance in shackles prejudiced his trial. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

"The Sixth Amendment guarantee of the right to a fair trial means that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Banks*, 249 Mich App at 256, quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). Freedom from shackling during trial has long been recognized as an important component of a fair and impartial trial. *Id.* The shackling of a defendant during a trial is permitted only in extraordinary circumstances, *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996), because a defendant appearing before a jury handcuffed or shackled negatively effects the presumption of innocence. *Banks*, 249 Mich App at 256. However, a defendant's right to appear at trial free of physical restraint is not absolute. *Id.* A trial court may order a defendant to be handcuffed or shackled to prevent

escape, to prevent the defendant from harming others in the courtroom, or to ensure an orderly trial. *Id.* at 257.

In this case, the prosecutor asked the trial court to shackle defendant based on his long and violent criminal history. Rather than object to the prosecutor's request, defendant's trial counsel merely noted that his "rapport" with defendant had improved, but that he still had some concern. Based on these brief statements, the trial court determined that defendant should be shackled.

Defendant's trial counsel's statement presumably was a reference to an incident that defendant's counsel had earlier described at a hearing on his motion to withdraw. At the hearing, defendant's trial counsel related to the trial court that defendant was unhappy with his representation. Defendant's trial counsel also described an incident at a meeting with defendant in a holding cell. Defendant's trial counsel stated that defendant told him that he wanted to fire him and approached him in a way that trial counsel described as intimidating or threatening.

The trial court cited two rationales in support of its decision. First, the trial court noted that, because being a prisoner was an element of the crime charged, it was no secret that defendant was a prisoner and it would not prejudice him to be shackled. Second, the trial court reasoned that defendant's apparent prior attempt to intimidate his attorney warranted it.

Although the decision to shackle a defendant is within the court's discretion, the decision made must be supported by evidence in the record. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994); see also *Banks*, 249 Mich App at 257. In *Banks*, a panel of this Court reversed the defendant's conviction because it found that the trial court abused its discretion when it required the defendant's witness, a prison inmate, to be shackled while testifying. *Banks*, 249 Mich App at 251, 257-258, 261. This Court held that the same analysis applicable to a decision to shackle a defendant applies to the decision to shackle a testifying witness. *Id.* at 257. And, absent a showing that the witness either threatened to escape, posed a danger to others in the courtroom, or threatened to disrupt the trial, he or she should not be shackled. *Id.* at 256-257. A mere statement of preference that the witness—or, in this case, the defendant—be shackled is insufficient. *Id.* at 258.

Similarly, in *People v Baskin*, 145 Mich App 526, 545-546; 378 NW2d 535 (1985), this Court held that the trial court abused its discretion when it ordered that the defendant be shackled during his trial. In *Baskin*, the defendant, a prison inmate, was convicted of two counts of assault on a prison employee. *Id.* at 529. Out of concern for the safety of others in the courtroom, the trial court ordered that Baskin be shackled during the trial. *Id.* at 545. In holding that this was an abuse of discretion, this Court reasoned that because there was no evidence that the defendant would not cooperate with the proceedings, attempt to escape, or presented a security risk to others, the trial court's decision was in error. *Id.* at 545-546. The *Baskin* Court also held that the trial court's error was not harmless and could not have been cured by an instruction to the jury. *Id.* at 546. The *Baskin* Court stated that "[t]his is a situation where actions speak louder than words. The mere shackling of the defendant in this case impinged upon defendant's credibility by indicating that defendant could not be trusted and prejudiced his right to a fair trial." *Id.*

Here, like in *Banks* and *Baskin*, the trial court erred when it held that defendant should be shackled during the trial. Other than defendant's status as a prisoner, there was no indication in

the record that defendant's behavior during his appearances in court justified a finding that he should be shackled. On appeal, the prosecutor argues that, when defendant's previous conduct is coupled with the reason for the request—that is, defendant's criminal history—and the fact that defendant's counsel expressed reservations, the trial court had an adequate basis for granting the request. This argument is unconvincing. As with the case in *Banks*, the prosecutor and defense counsel's statements were nothing more than statements of personal preference. Neither the prosecutor nor defense counsel brought to the court's attention a single incident during the court proceedings where defendant disrupted the proceeding, threatened the safety of others in the courtroom, or threatened to escape. Therefore, the trial court abused its discretion when it ordered defendant shackled without an adequate basis for doing so. Further, we conclude that this error prejudiced defendant's trial.[1]

The primary evidence at trial was a videotape of defendant in the prison yard. The video purportedly showed defendant handling a shank and then dropping it in the yard when approached by a guard. However, the video was not particularly clear and was apparently open to some interpretation. And defendant's theory was that a nearby prisoner had the weapon and tossed it in his vicinity just prior to the guard's approach and that the item shown in his hands on the video was not the shank at issue, but a different form of contraband. Thus, the evidence against defendant was not overwhelming and the case to a significant degree turned on the jury's understanding of the video evidence, which in turn depended on defendant's testimony. For that reason, defendant's credibility was a key factor in the weighing of the evidence.

"'The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man . . . .'" *People v Shaw*, 381 Mich 467, 472-473; 164 NW2d 7 (1969), quoting *Eaddy v People*, 115 Colo 488, 491-492; 174 P2d 717 (1946). By ordering defendant to be shackled before the jury, the trial court undermined the presumption of innocence and adversely affected defendant's credibility. See *Banks*, 249 Mich app at 256. And defendant's credibility was essential to his defense. Further, we do not agree that the nature of the offense and the fact that the jury knew that defendant was already incarcerated minimized the prejudice. Defendant's appearance in shackles suggested that defendant was particularly dangerous, even for a prisoner.

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[1] As noted, defendant's trial counsel did not object to the prosecutor's request to have defendant shackled and arguably might have approved the request. However, after the close of proofs, defendant asked to place an objection on the record to "being presented in front of the jury in leg irons and belly chains." Because we conclude that defendant would be entitled to a new trial even if this error were unpreserved, see *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), we decline to address whether the error was unpreserved or preserved constitutional error. We also decline to consider whether defendant's trial counsel could and did waive any claim of error with regard to defendant's appearance in shackles. Under the facts of this case, even if we were to conclude that defendant's trial counsel waived this issue, we would nevertheless conclude that that decision to agree to the shackling fell below an objective standard of reasonableness under prevailing professional norms and prejudiced defendant's trial. *Yost*, 278 Mich App at 387. Therefore, defendant would still be entitled to a new trial for ineffective assistance of counsel.

Presumably, a prisoner who is so dangerous that he must be shackled during trial is a prisoner who is more likely than the average prisoner to gain possession of a dangerous weapon while incarcerated. See *Ruimveld v Birkett*, 404 F3d 1006, 1016 (CA 6, 2005) (concluding that the Michigan Court of Appeals made an unreasonable application of the harmless error test and explaining that the fact that the prisoner-defendant "had to be shackled . . . might have further prejudiced his case in the eyes of the jurors who might have believed him to be a particularly dangerous or violent person, even among inmates."). Hence, contrary to the prosecutor's argument, we conclude that the particular nature of the charged offense made defendant's appearance in the "garb of innocence" even more essential to a fair trial. Therefore, we cannot conclude that this error was harmless.

The trial court's decision to shackle defendant without proper evidence to support that decision fell outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353. Because that error was not harmless, we reverse defendant's conviction and remand for a new trial.

Given our resolution of this issue, we decline to address defendant's claim that the trial court erred when it denied his request for a new attorney. We also decline to address defendant's claim that the trial court improperly scored offense variable 19; if defendant is again convicted, he may present that argument in the first instance to the trial court. However, because defendant's claims of error with regard to the habitual offender charge and the destruction of evidence are pertinent to the proceedings on remand, we shall address them.

Defendant argues that the trial court abused its discretion when it denied his motion to dismiss the habitual offender charge for lack of service. Service of process is complete upon mailing of a properly addressed letter that contains sufficient postage. MCR 2.107(C)(3). There is a rebuttable presumption that a properly addressed item reaches its desired destination. *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). Whether a party has produced sufficient evidence to rebut this presumption is a question of fact. *Stacey v Sankovich*, 19 Mich App 688, 694; 173 NW2d 225 (1969). A bare denial of service is insufficient to overcome the presumption of receipt. *Ins Co of North America v Issett*, 84 Mich App 45, 49; 269 NW2d 301 (1978).

In the present case, the trial court found that defendant had not overcome this presumption. And this Court affords great deference to a trial court's factual findings. See, e.g., *Delph v Smith*, 354 Mich 12, 18; 91 NW2d 854 (1958). On appeal, defendant has failed to establish that the trial court's finding was clearly erroneous.

In the alternative, defendant argues that if defense counsel received notice of the prosecutor's intent to charge him as a habitual offender, then defense counsel's failure to notify him of that fact until trial deprived him of effective assistance of counsel. "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387. The effective counsel is presumed, and a defendant who challenges his counsel's assistance bears a heavy burden of overcoming that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

It is undisputed that defense counsel had an obligation to inform defendant about the prosecutor's intent to charge defendant as a habitual offender. Defense counsel failed to do so until shortly before trial. Consequently, defendant was under the mistaken assumption that the prosecutor did not intend to charge him as a habitual offender; and, against his trial counsel's advice, defendant declined to accept a favorable plea agreement based on that assumption. At sentencing, defendant received a much greater sentence than he would have had he accepted the plea agreement. At a brief hearing before the trial court regarding his counsel's purported ineffective assistance, defendant stated that had he known that the prosecutor intended to charge him as a habitual offender, he would have accepted the plea agreement. However, the trial court was not required to accept the plea agreement, MCR 6.302(C)(3), and there is no evidence that the trial court would have accepted the deal and sentenced defendant accordingly. Consequently, defendant has not shown that more likely than not his trial counsel's failure to advise him about the habitual offender notice warrants relief. *Yost*, 278 Mich App at 387.

In a supplemental brief, defendant argues that he was also deprived of a fair trial when the trial court denied his motion to dismiss the case due to destruction of evidence. There is no general constitutional right to discovery, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), but disclosure of exculpatory material is mandated by due process principles. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Due process requires disclosure of evidence in the prosecutor's possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a due process violation, a defendant must show: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecutor willfully or inadvertently suppressed the evidence; and (4) that if the evidence had been disclosed to the defendant, it is reasonably probable that the result of the proceedings would have been different. *Cox*, 268 Mich App at 448, citing *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The loss of evidence with unknown probative value, which is thus only potentially exculpatory, denies due process only when the police act in bad faith. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Prior to trial, the prosecutor sought to introduce as evidence of defendant's guilt a video recording made of the incident from the prison recording system. Defendant challenged the admissibility of the video recording, claiming that the videotape was inaccurate and incomplete because it did not contain footage from the entire time he was in the prison yard. Defendant argued that it was important to his defense that the prosecutor provide him with the entire footage. Part of defendant's defense was that another inmate threw the weapon defendant was charged with possessing. Initially, the trial court ruled that the prosecutor must provide defendant with a video that contained footage from 10 minutes before and 10 minutes after defendant entered the prison yard, which the prosecutor agreed to do. However, the prosecutor later learned that it was the Department of Corrections' policy to record over videotapes within 10 days of being made. Consequently, the additional footage defendant requested had been recorded over 10 days after the date of the incident, which was three months before defendant requested the material and five months before the trial court ordered the prosecutor to provide defendant with the additional footage. Defendant then filed a motion to dismiss the charge against him claiming that the prosecutor, in bad faith, destroyed potentially exculpatory evidence.

Defendant bears the burden of showing that the evidence was exculpatory and that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant has failed to meet either burden. The videotape evidence provided to defendant contained all of the footage from the moment defendant was suspected of having a weapon until he left the prison yard. Thus, the video footage provided showed defendant walking through the prison yard toward the inmate who defendant claims was really in possession of the weapon and who threw the weapon at him. Because the videotape contained the footage necessary to either dispel or confirm defendant's defense, it cannot be said that the trial court abused its discretion when it held that the remaining video footage would not provide exculpatory evidence.

Even if we were to accept defendant's argument that the additional footage contained potentially exculpatory evidence, his claim must nevertheless fail. The failure to preserve evidence that may potentially have exculpatory value only violates due process when it was destroyed in bad faith. *Youngblood*, 488 US at 57-58. The routine destruction of evidence pursuant to departmental policy where the purpose is not to destroy evidence a defendant needs to prove his or her defense is not bad faith. *People v Petrella*, 124 Mich App 745, 753; 336 NW2d 761 (1983). Hence, the trial court did not err when it denied his motion to dismiss based on the destruction of evidence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

EXHIBIT J

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAMAL ISOM,

Defendant-Appellant.

UNPUBLISHED
April 8, 2010

No. 284857
Saginaw Circuit Court
LC No. 07-028598-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right from his convictions of second-degree murder, MCL 750.317, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, attempted armed robbery, MCL 750.92; MCL 750.529, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 60 to 90 years in prison for the second-degree murder and conspiracy convictions, five to ten years' imprisonment for the attempted armed robbery, felon in possession, and CCW convictions, and two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant's convictions arose out of the attempted robbery of Raychan Williams and the shooting death of Darnell Eiland. The evidence at trial indicated that on the night of the crimes, defendant and Prophet Phillips were driving around with Doretha Ransom. The men went together to Williams's apartment, where Phillips tried to convince Williams to open the door by stating that he wanted to buy drugs. When Williams refused to open the door, defendant pointed a gun at him. Williams jumped away, and defendant and Phillips returned to the car. Shortly thereafter, the three drove to another home, ostensibly to buy drugs. Defendant and Phillips went to the house while Ransom waited in the car. Ransom heard gunshots, and then defendant and Phillips returned to the car. Defendant had been shot in the hand. Defendant gave Phillips a gun, and then Phillips left. Ransom took defendant to the hospital. While defendant was being treated, Eiland's body was found. When the police came to the hospital to investigate defendant's gunshot wound and to determine if the Eiland death was related, defendant fled, but was apprehended shortly thereafter.

Defendant first argues that his constitutional right to equal protection was violated when the plaintiff used peremptory challenges to excuse two African-American jury panel members. See *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The trial court found

that defendant failed to make a prima facie showing of discriminatory use of peremptory challenges, and further found that plaintiff had demonstrated a race-neutral reason for the challenges. We review for clear error the trial court's factual finding concerning the prima facie showing. *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005) (Opinion by Corrigan, J.).

The purpose of *Batson* is to prevent discriminatory exclusions of veniremembers on the basis of race or gender. *Knight*, 473 Mich at 351. A defendant is not entitled to a jury of a particular racial composition provided that no racial group is systematically and intentionally excluded. *Id.*

To make a prima facie showing of a *Batson* violation, a defendant must establish three factors:

> (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight,* 473 Mich at 336, citing *Batson,* 476 US at 96.]

The trial court must consider all relevant circumstances to determine whether a prima facie showing has been established. *People v Bell*, 473 Mich 275, 283; 702 NW2d 128, mod 474 Mich 1201 (2005) (Opinion by Corrigan, J).

> Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied.
>
> Finally, the trial court must decide whether the non-challenging party has carried the burden of establishing purposeful discrimination. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination "comes down to whether the trial court finds the ... race-neutral explanations to be credible." The Court further stated, "Credibility can be measured by, among other factors, the ... [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. [*Id.* (internal citations omitted.)]

The trial court held that defendant failed to make a prima facie showing. However, for purposes of completeness, the prosecutor explained that his dismissal of the jurors in question involved their understanding of legal principles and education level, and the trial court found that the explanation was valid. The prosecutor further stated that his officer-in-charge, also an African-American male, requested the dismissal of one of the jurors based on his answers to questions. The factual circumstances do not support defendant's claim of discrimination. It is the province

of the trial court to make determinations of credibility and demeanor regarding the basis of the strike of a jury by the prosecutor, and we must defer to the trial court's resolution of these issues. *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008). Therefore, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. *Id.* Based on the record, we cannot conclude that the trial court's rulings were clearly erroneous.

Defendant next contends that the evidence was insufficient to convict him of conspiracy to commit armed robbery of the murder victim. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues that support the jury verdict. *Id.* When assessing a challenge to the sufficiency of evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). "Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense." *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). When challenging the sufficiency of the evidence, the focus is on whether the evidence justifies submitting the case to the jury or requires judgment as a matter of law. *Id.*

Defendant contends that evidence of a conspiracy to rob the murder victim was virtually non-existent because witness Ransom was unable to testify regarding any agreement to rob. Furthermore, the attempt to rob Williams before the murder should have been excluded from trial because the prosecutor did not file a motion to admit similar acts evidence pursuant to MRE 404(b).[1] Therefore, the only evidence, that the men fired their weapons at the scene of the murder, is insufficient to prove a conspiracy. We disagree. To establish a conspiracy, the prosecutor had the burden of establishing that defendant intended to combine with Phillips to accomplish an illegal objective. See *People v Mass,* 464 Mich 615, 629; 628 NW2d 540 (2001). Although defendant claims that the prosecutor was required to establish that defendant and Phillips conspired specifically to commit an armed robbery at the home of the murder victim, the record substantiates the prosecutor's theory of the case that the men engaged in a conspiracy to rob local drug dealers on the night in question. Defendant's attempt to exclude the evidence surrounding the attempt to rob Williams is without merit. A jury is entitled to hear the "complete story" surrounding the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Evidence of other criminal events are admissible when so blended or connected to

[1] Defendant also contends that the counts involving Williams should have been severed from this trial. As discussed in this opinion, that issue is also without merit.

another crime of which the defendant is accused such that proof of one incidentally involves or explains the circumstances of the other. *Id.* There was sufficient circumstantial evidence to support the conspiracy conviction.

Defendant also alleges that the evidence was insufficient to convict him of second-degree murder.[2] We disagree. A defendant may be guilty of second-degree murder if the defendant aids or abets a principal in the commission of a murder with knowledge of the principal's intent. See *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). The *Robinson* Court held:

> [A] defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*Id.*]

The elements of second-degree murder are: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007), citing *People v Goecke,* 457 Mich 442, 464; 579 NW2d 868 (1998). "'Malice' is defined as an act done 'with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.'" *People v Gillis*, 474 Mich 105, 138; 712 NW 2d 419 (2006), quoting *People v Mendoza,* 468 Mich 527, 540; 664 NW2d 685 (2003). In other words, an intent to commit second-degree murder can be established through evidence of "intent to do an act in obvious disregard of life-endangering consequences." *Goecke,* 457 Mich at 466. The mens rea for second-degree murder does not require a finding of specific intent to harm or kill. *Id.*

Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to allow a reasonable juror to find that defendant and Phillips intended to act in obvious disregard of life-endangering consequences. Williams testified that he woke up because individuals had knocked on his door in the early morning. The men purportedly came to the door to purchase drugs, but when Williams asked to see the money Phillips turned to defendant. Defendant pointed a gun at Williams, and that the gun appeared to be .40 caliber semiautomatic handgun. Williams did not open the door, jumped back, and heard the sound of a gun firing.

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[2] The statement of this issue asserts that there was insufficient evidence to convict defendant of felony-murder. Defendant was not convicted of felony-murder. Despite the statement of the issue, we will address the sufficiency of the evidence to support the second-degree murder conviction.

Unable to obtain drugs or money from Williams, the two men went to another home nearby where Phillips had purchased drugs in the past. The forensic evidence established that .40 caliber bullets were found in this home and that defendant's blood was spattered on the wall of the house. The jury could thus infer that either defendant or Phillips fired a .40 caliber bullet that killed Eiland. Either inference, combined with the evidence that the men had attempted to rob Williams and that they were armed when they approached the house, was sufficient to support the conviction for second-degree murder.

Next, defendant contends that the prosecutor's references during closing argument to his silence violated his Fifth Amendment rights.[3] Defendant did not object to the references at trial.[4] An unpreserved challenge to use of pre-*Miranda*[5] silence does not require reversal when the evidence concerning the silence did not affect the outcome of the trial. *People v McNally*, 470 Mich 1, 8; 679 NW2d 301 (2004). Moreover, the Fifth Amendment does not preclude use of a defendant's pre-arrest, pre-*Miranda* silence. *People v Schollaert,* 194 Mich App 158, 164-165; 486 NW2d 312 (1992). A party may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). That is, a defendant may not waive objection to an issue before the trial court and raise it as an error on appeal. *Id.* Evidence of flight is admissible to support an inference of consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Evidence of flight is probative of a defendant's guilty state of mind. *People v McGhee*, 268 Mich App 600, 639; 709 NW2d 595 (2005).

Review of the record reveals that the prosecutor did not improperly comment on defendant's pre-*Miranda* silence. Rather, defendant attempted to assert that his flight from the hospital occurred because he learned that someone was trying to kill him. The prosecutor's comment was designed to address the absurdity of the defense theory because defendant could have requested police assistance or protection at the hospital. Moreover, review of the closing argument by defense counsel reveals that the failure to object to the comments regarding silence at the hospital was purposeful. Specifically, defense counsel acknowledged that defendant was nonresponsive to questions, but he was admitted to the hospital under his real name, not an alias. Further, defense counsel noted that any flight and failure to respond to questions regarding his injury may have occurred because defendant had a prior felony conviction and he was concerned about police contact. Under the circumstances, this challenge as raised by defendant is not substantiated by a review of the record.

Defendant next submits that the trial court erred by failing to sever the charges that occurred at 313 North 9th Street from the events that occurred at 1111 Federal Avenue. We disagree. A trial court's ultimate ruling regarding a motion to sever is reviewed for an abuse of

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[3] US Const, Am V.

[4] We note that the statement of the question presented alleges that defendant was deprived of a fair trial because both a police witness and the prosecutor commented on his silence. However, defendant does not name the police witness or cite to the location in the record. An appellant may not leave it to this Court to search for the factual basis to support or reject his claim. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). However, in the present case, there is no indication that defendant filed a motion to sever the charges that occurred at two different locations.[6] Consequently, the trial court's failure to severe the charges on its own motion do not present a basis for setting aside the convictions unless the refusal to take this action is inconsistent with substantial justice. *People v Williams*, 483 Mich 226, 231-232; 769 NW2d 605 (2009).

A defendant has a right of severance for unrelated offenses. MCR 6.120(C). The issue of the propriety of joinder and severance may be raised by motion of the parties, stipulation by the parties, or on the court's own initiative. MCR 6.120(B). Joinder is appropriate when the offenses are related. MCR 6.120(B)(1). Offenses are related if they are based on: (a) the same conduct or transaction; (b) a series of connected events; or (c) a series of acts involving parts of a single plan or scheme. MCR 6.120(B)(1)(a)-(c). The court may consider other relevant factors, including: (1) the promotion of fairness to the parties; (2) the assurance of a fair determination regarding the guilt or innocence of the accused for each offense; (3) the timeliness of the request; (4) the drain on the parties' resources; (5) the potential for confusion or prejudice arising from the number of charges, the complexity of the case, or the nature of the evidence; (6) the harassment potential; (7) the convenience of the witnesses; and (8) the readiness for trial. MCR 6.120(B), (B)(2). The plain language of the unambiguous court rule provides that offenses are related when they comprise either the same conduct or a series of connected acts. *Williams*, 483 Mich at 232-233.

In the present case, it was the prosecution's theory of the case that defendant and his associate, Prophet Phillips, engaged in a "mission [ ] to rob drug dealers." In the first attempt, the drug dealer refused to open the door. Within a short time and within a few blocks of the first attempt, a drug dealer was killed. Under the circumstances, the offenses were related because a series of connected acts occurred in accordance with defendant's plan. *Williams*, 483 Mich at 233; MCR 6.120(B)(1)(b), (c). This challenge does not provide defendant with appellate relief. *Williams*, 483 Mich at 231-232; MCR 2.613(A).

Lastly, defendant contends that his sentences for conspiracy, attempted armed robbery, felon in possession, and CCW convictions exceed the guidelines, and the trial court failed to offer a basis for the upward departure from the guidelines. We disagree. When multiple concurrent convictions are at issue, a presentence investigation report is prepared for the highest crime class felony conviction only. See *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005); MCL 771.14(2)(e). Accordingly, there was no sentencing error.[7]

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[6] Review of the lower court records reveals that trial counsel filed a motion to sever the trial with regard to a codefendant. There is no indication that defendant requested severance of charges.

[7] We note that Michigan Supreme Court Justices Markman and Corrigan have noted an apparent split in authority between *Mack* and *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005) on whether the legislative sentencing guidelines must be scored for all felonies for which a defendant stands convicted. See *People v Getscher*, 478 Mich 887, 887-888; 731 NW2d 768 (2007) and *People v Smith*, 475 Mich 891, 891-892; 716 NW2d 273 (2006). However, because this Court found no conflict between *Mack* and *Johnigan*, we are bound by *Mack*. MCR

(continued...)

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

(...continued)

7.215(J).

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAMAL ISOM,

Defendant-Appellant.

UNPUBLISHED
April 8, 2010

No. 284857
Saginaw Circuit Court
LC No. 07-028598-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur in the result reached by the majority. I write separately to set forth an alternate analysis regarding defendant's *Batson*[1] claim.

The prosecutor exercised his second peremptory challenge to excuse Johnny Green, an African-American venireman. Defendant timely raised a *Batson* challenge at sidebar after the prosecutor peremptorily excused a second African-American juror, Johnnie Sewell. The trial court excused the jury for the afternoon and, before defense counsel had articulated a *Batson* argument, the trial court announced, "Now, I would like for [the prosecutor] to state his nonracial reason so that I—." The prosecutor interjected that the defense "hasn't made a motion. They need to make a motion, and then I'd like some time to research the law." The trial court adjourned to give the parties and the court an opportunity to conduct legal research.

When court reconvened the next morning, defense counsel explained as follows the basis for his *Batson* challenge:

> So in . . . his first four challenges, including six passes, two of the jurors that were excluded were black males, and it just—given the tenor of the exam during voir dire and given the challenges, it certainly created an appearance for me and a concern for me that these jurors were being excluded because they were black males and that there was nothing in the record that came up during the voir

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[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), mod in *Powers v Ohio*, 499 US 400, 415-416; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

> dire that would . . . cause any other reason—cause me to have any other reason to form any other belief.

The prosecutor responded that "there is no prima facie showing of a discriminatory purpose and ... it's not a jury constituted on race at all." The prosecutor nonetheless proceeded to relate race-neutral reasons for his exclusions of Green and Sewell. The prosecutor claimed that Sewell seemed "confused" by the concept of circumstantial evidence, had an eleventh grade education, and "looked confused" in general during the voir dire. According to the prosecutor, Green "had indicated quite candidly that as a 60-some-year-old black man raised in the south he had issues with the police," and also could not discern a distinction between "proof beyond a reasonable doubt and proof beyond any shadow of a doubt."

"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991); see also *People v Bell*, 473 Mich 275, 296 (opinion by Corrigan, J.); 702 NW2d 128, mod 474 Mich 1201 (2005). Given the prosecutor's offering of reasons for his peremptory challenges, whether a prima facie case of juror discrimination existed is of no consequence, and the majority need not have considered this question.

In *Batson*, the United States Supreme Court introduced the procedure that trial courts must follow when a prosecutor elects to proceed to the second step of the three-step juror exclusion analysis, the articulation of a race-neutral ground for juror dismissal. "The prosecutor ... must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. Step two requires the prosecutor to "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id.* at 98 n 20 (internal quotation omitted). Here, the prosecutor unquestionably supplied race-neutral and specific explanations for his strikes of the challenged minority jurors. Because the prosecutor's explanations qualify as race-neutral, "we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent." *People v Knight*, 473 Mich 324, 344; 701 NW2d 715 (2005), quoting *United States v Uwaezhoke*, 995 F2d 388, 392 (CA 3, 1993).

In *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003), the United States Supreme Court observed that "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. . . . [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." The burden of persuasion concerning purposeful discrimination falls on and never leaves the opponent of a strike. *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). In *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008), the United States Supreme Court expounded on the trial court's central role in discerning a *Batson* violation:

> On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation

> of the prosecutor's credibility, and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province, and we have stated that in the absence of exceptional circumstances, we would defer to the trial court. [Internal citations and quotation omitted.]

The Michigan Supreme Court has also emphasized that reviewing courts should defer to a trial court's ultimate resolution of a *Batson* challenge. In *Knight*, 473 Mich at 344, our Supreme Court explained that appellate courts review for clear error a trial court's finding that the opponent of the peremptory challenge has proved purposeful discrimination. "[T]he trial court's ultimate factual finding is accorded great deference." *Id.*

Here, the trial court correctly recognized that step three of its *Batson* analysis obligated it to determine whether defendant had fulfilled his burden of demonstrating purposeful discrimination:

> Well, it says here, finally, if the proponent provides a race neutral explanation as a matter of law, the trial court must then determine whether the race neutral explanation is a pretext or whether the opponent of the challenge has proved purposeful discrimination. The courts strongly urge the trial courts to make clear and detailed findings on this subject.
>
> So . . . it's apparent to me that most of the voir dire was taken up with reasonable doubt, circumstantial evidence and to the point where I felt that indeed it was important that I give further instruction, one at the request of the defendants [sic]. However, . . . both jurors reflected some confusion over whether they could make a decision based upon the instructions of the law and not out of the fact that they just didn't kind of like the law.
>
> . . . [I]n Mr. Green's case, I think it's not inconsequential that he had had trouble apparently with the police in the past and, therefore, would have some reason sufficient other than racial to be challenged. And I might say peremptorily and not for cause because I don't mean to imply that I felt he could have been challenged successfully for cause, but we're looking for a peremptory that is non racial.
>
> As to Mr. Sewell, I have read the interchange [sic] that I think creates at least a question that he would not want to use circumstantial evidence and that in the end he would resort to his own common sensibility. Of course, we tell jurors to do that, too, but not in violation of the law.

> So I'll deny the motion under the circumstances—for those reasons that I feel after . . . in essence, particularly in light of the fact there are other blacks on the jury and there has been some passes that the challenge appropriately should be denied at this point.

The record supports the trial court's findings that the challenged jurors expressed confusion about reasonable doubt and circumstantial evidence, and that defendant failed to carry his burden of establishing as pretextual the prosecutor's explanations for the peremptory strikes. However, I take issue with the trial court's finding that the presence of "other blacks on the jury" served to rebut defendant's *Batson* challenge. *Batson* contemplates that a "single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." 476 US at 95-96 (internal quotation omitted). In *Lancaster v Adams*, 324 F3d 423, 434 (CA 6, 2003), the Sixth Circuit further clarified this principle as follows:

> Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*. Recently, this Court reached precisely this conclusion when we rejected the proposition that "the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others." [Quoting *United States v Harris*, 192 F3d 580, 587 (CA 6, 1999).]

See also *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987) ("In remanding this case, we emphasize that under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.").[2]

Nonetheless, because the trial court engaged in the evaluative process contemplated by *Batson* and found persuasive justifications for the strikes supported in the record, I concur that no clear *Batson*-related error exists.

/s/ Elizabeth L. Gleicher

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[2] For similar reasons, I also disagree with the majority's intimation that the sentiments of the officer-in-charge, an African-American, could rebut defendant's claim of discriminatory jury selection. See *ante* at 3. Regardless whether the African-American officer-in-charge expressed a preference for excusing two minority jurors, the prosecutor bore the burden of setting forth a *race neutral* reason for the strikes.

EXHIBIT K

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ROBERT KENNETH BECKER,

Defendant-Appellant.

UNPUBLISHED
December 15, 2009

No. 283573
Montmorency Circuit Court
LC No. 07-001722-FC

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of escape while awaiting trial, MCL 750.197(2); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to prison terms of two to four years for escape, two years for felony-firearm, 21 to 35 years for assault with intent to murder, two to five years for felon in possession of a firearm, and 13 months to two years for resisting and obstructing a police officer. We affirm.

This case stems from an incident occurring at the Montmorency County Circuit Court. Upon hearing the jury verdict in a prior case, defendant fled the courtroom and the courthouse and ran to his vehicle. Defendant pulled a 20-gauge shotgun from his vehicle and pointed it at an officer who was pursuing him. The officer testified that defendant pulled the trigger, but the shotgun misfired. Defendant was taken into custody where he was charged with and convicted of the above-cited offenses.

Following his convictions, defendant filed the instant appeal arguing, among other things, that there was no reviewable record of the instructions given to the jury. Defendant asserted that, as a result, he was denied his rights to due process, equal protection, and to an accurate record for appellate review. Defendant also moved for a remand to the trial court to "settle the record" with respect to the jury instructions. This Court granted the motion and remanded the matter to the trial court for "appropriate proceedings to settle the record as to the content of the written jury instructions on the elements of the charged crimes." A transcript of the proceedings held to settle the record was provided to this Court.

On appeal, defendant first argues that his convictions should be reversed because the judge was disqualified to hear the case based on personal bias under MCR 2.003(B)(1), (2), and (6) or, in the alternative, based on the high probability of actual bias. These claims are based upon the fact that the trial judge witnessed defendant's escape from the courtroom.

A party must file a motion to disqualify a judge within 14 days after discovering the ground for disqualification. MCR 2.003(C). The failure to file such a motion may waive the issue for appeal. See *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). Waiver extinguishes the underlying error, and the relevant issue generally cannot be appealed. *People v Adams*, 245 Mich App 226, 239-240; 627 NW2d 623 (2001).

Here, defendant did not file a motion for judicial disqualification despite the fact that he had full knowledge of the grounds for disqualification long before the trial began. Clearly, when defense counsel raised the issue at arraignment, he knew the potential grounds for disqualification. However, despite this knowledge, defendant did not file a motion for judicial disqualification. It would be unjust for defendant to have full knowledge of a potential disqualification issue before a criminal trial has even begun, decline to raise the issue in the lower court, and then seek redress on appeal after obtaining an unfavorable result at trial. For these reasons, we consider this issue waived. To allow defendant to proceed on this allegation of error would contravene the longstanding rule against a party harboring error as an appellate parachute. *Polkton Charter Tp v Pellegrom*, 265 Mich App 88, 96; 693 NW2d 170 (2005).

In addition to disqualification under MCR 2.003, in some circumstances due process will require disqualification because of the high probability of bias, including when the judge has a pecuniary interest in the outcome of the case, has been the target of personal abuse or criticism from a party, is enmeshed in other matters involving a party, or has previously participated in the case as accuser, investigator, factfinder or initial decisionmaker. *Armstrong v Ypsilanti Charter Twp,* 248 Mich App 573, 599; 640 NW2d 321 (2001). The "[Michigan Supreme Court] has examined the issue of judicial disqualification pursuant to the Due Process Clause and has found that disqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain v Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996).

In this matter, the fact that the judge witnessed defendant's escape from the courtroom gave him no more interest in the case than he would have had in any criminal case assigned to his docket. It was not for the trial court to decide defendant's guilt or innocence; this was left to the jury. Presiding over a trial where the judge has had prior contact with the defendant does not provide the judge with a vested interest. Because this situation does not coincide with the type of extreme case that would justify a due process disqualification, the trial court was not required to *sua sponte* recuse himself.

Defendant next argues that he was denied due process when the trial court provided written elements of the crimes charged to the jury in lieu of reading them in open court, and when the trial court failed to make the written instructions a part of the lower court record. However, defendant was given an opportunity to object to the trial court's decision on how to instruct the jury. Instead of objecting or requesting the instructions be read to the jury, defendant (through counsel) affirmatively agreed with the trial court's proposed procedure of reading the general instructions and providing separate pieces of paper to the jury that set forth the elements

of each crime. This affirmative approval waives this issue for appeal. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defendant next argues that defense counsel was ineffective for agreeing to the jury instruction procedure described above. "To establish ineffective assistance of counsel the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008), citing *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant claims that there is no strategic reason for an attorney to agree to a "constitutionally impermissible" procedure related to something as fundamental as proper instructions on the elements of the charged and lesser offenses, and also argues that there is no way to ascertain whether the jury read the instructions while in the jury room. While traditionally trial courts read the instructions to the jury or read the instructions *and* provide written copies of the instructions to the jury, we find no authority for defendant's claim that the procedure utilized by the trial court was constitutionally impermissible. It is possible that defense counsel was of the opinion that giving written instructions to the jury to read would clarify the instructions and lead to a more advantageous result for defendant. Defendant has not overcome the strong presumption that defense counsel's agreement with the procedure utilized was sound trial strategy.

Defendant next contends that his conviction must be reversed given that the parties were unable to successfully settle the record regarding the instructions on remand. According to defendant, because no witness could testify with one hundred percent certainty as to the actual written instructions given to the jury, the record remains unsettled on this issue and, therefore, defendant was denied due process. We disagree.

This Court has held that the inability to obtain the transcripts of criminal proceedings may so impede a defendant's right to appeal that a new trial must be ordered. *People v Horton*, 105 Mich App 329, 331; 306 NW2d 500 (1981); *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). If, however, the surviving record is sufficient to allow evaluation of defendant's claims on appeal, defendant's right is satisfied. *People v Audison, supra,* at 834-835.

At the hearing on remand, defendant's trial counsel testified that he found a set of jury instructions, in his file on defendant's case, with his own handwritten notes on them. Counsel recalled looking at the instructions and reviewing them with the trial judge and the prosecutor, and agreeing that they could be submitted to the jury, but could not confirm that they were actually sent to the jury. Counsel testified that he assumed the written instructions were provided to the jury, but did not independently recall them actually being handed to the jury.

The prosecutor testified that she believed, with 90-95% certainty, that the instructions found in defense counsel's file were those that were provided to the jury (with the exception of

one instruction containing defense counsel's notes). The prosecutor specifically recalled going over the elements of the charged crimes with the trial judge and defense counsel.

The trial judge testified that the jury instructions setting forth the elements of the charged offenses were not read in open court, but were provided in written form to the jurors. The now-retired trial judge testified that he used this procedure in every criminal trial that he presided over during his 18 years on the bench. According to the trial judge, a clerk typed up the elements for each offense, using the Criminal Jury Instructions. In preparation for the hearing, the trial judge testified that he called the clerk who prepared the instructions for him for the last 15 or 16 years of his career and asked her to retrieve the list of elements used in defendant's trial. The judge testified that the instructions would have been kept in a separate office file that he maintained for every case that went to verdict or in a file that the clerk kept containing lists of the elements of criminal charges. The trial judge testified that he compared the list provided by the clerk to the charges contained on defendant's jury verdict form, and the list matched defendant's charges. To the best of the trial judge's recollection, the instructions provided to him were exactly the same as those that were provided to the jury at defendant's trial.

The clerk, Ms. LaMarre, testified that the written instructions she provided to the trial judge were retrieved from her computer. Ms. LaMarre testified that when she received the request, she retrieved defendant's verdict form, which she had saved on her computer, then looked up the offenses listed on the verdict form from a folder stored on her computer entitled "elements of the offense."

The record reflects that the trial judge and each counsel recalled reviewing written instructions concerning the elements of each offense. Defense counsel produced written instructions from his file that he had no reason to believe were not a copy of those that were provided to the jury. The trial judge, after requesting the written instructions that were used in defendant's case from a clerk at the court, compared them to the verdict form used in defendant's case and opined that they were the instructions he provided to the jury. The clerk testified that the instructions she provided to the trial judge were those that appeared on her computer and were used in defendant's case. Defendant having offered no real argument that any instructions other than those produced at the remand hearing were provided to the jury, the record was sufficiently settled so as to allow evaluation of defendant's claims on appeal. *Audison*, *supra,* at 834-835.

Next, defendant claims that the written jury instructions provided by the trial judge at the remand hearing, as well as those that were provided to the jury at trial, contained an erroneous instruction as to the felony firearm offense and that this conviction must therefore be reversed. We disagree.

The written jury instructions provided to the jury concerning the elements of the offense of possession of a firearm at the time of commission or attempted commission of a felony (felony firearm) read as follows:

The Defendant is also charged with the separate crime of possessing a firearm at the time he committed the crime of Assault With Intent To Murder. To prove this charge, the Prosecutor must prove each of the elements beyond a reasonable doubt:

1. That at the time the Defendant committed a felony*, he knowingly carried or possessed a firearm.

*Assault With Intent to Murder, Assault With Intent to Do Great Bodily Harm, and Assault With a Dangerous Weapon are all felonies.

CJI2D 11.34, the standard jury instruction concerning felony firearm provides:

(1) The Defendant is also charged with the separate crime of possessing a firearm at the time [he/she] committed [or attempted to commit] the crime of _____.

(2) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(3) First, that the defendant committed [or attempted to commit] the crime of _____, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime.

(4) Second, at the time the defendant committed [or attempted to commit] that crime [he/she] knowingly carried or possessed a firearm.

As pointed out by defendant, the instruction provided to the jury differs from the standard criminal jury instruction as to the offense elements of felony firearm. However, when given the opportunity to review the instructions and object to the same, defense counsel expressed satisfaction with the instructions. While a party who forfeits a right might still obtain appellate review for plain error, a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth,* 253 Mich App 670, 688; 660 NW2d 322 (2002). Because defendant affirmatively approved of the instructions as given, he has waived any review of the propriety of the same. However, regardless of defense counsel's failure to object, it would be impossible for this Court to assign error when the missing portion of the standard criminal jury instruction involved the jury's obligation to find that the defendant committed or attempted to commit the underlying felony and, in the instant matter, the jury was advised of the elements of the underlying felony and found defendant guilty of the underlying felony.

Finally, relying on *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004), defendant argues that the trial court erred in imposing attorney fees without indicating that it had considered defendant's ability to pay. However, *Dunbar* was recently overruled on the very point now argued. *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009):

> Thus, we conclude that *Dunbar* was incorrect to the extent that it held that criminal defendants have a constitutional right to an assessment of their ability to pay before the imposition of a fee for a court-appointed attorney. With no constitutional mandate, *Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing. See MCL 769.1k and 769.1*l*.

The *Jackson* Court also noted, "for purposes of an ability-to-pay analysis, we have recognized a substantive difference between the imposition of a fee and the enforcement of that imposition." *Jackson, supra* at 291-292. *Jackson* further noted that:

> Indeed, whenever a trial court attempts to enforce its imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency. Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. [*Id.* at 292 (emphasis omitted).]

Finally, *Jackson* concluded, "MCL 769.1*l* inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency." *Id* at 295. An "imprisoned defendant bears a heavy burden of establishing . . . extraordinary financial circumstances" sufficient to overcome this presumption. *Id.*

On February 5, 2008, on a form approved by the Supreme Court Administrative Office, the court ordered enforcement of the fee imposition, which included attorney fees. In accordance with MCL 769.1*l*, the court ordered the following:

> 2. For payment toward the obligation, the Department of Corrections shall collect 50% of all funds received by the defendant over $50.00 each month.
>
> 3. If the amount withheld at any one time is $100.00 or less, the Department of Corrections shall continue collecting funds from the defendant's prisoner account until the sum of the amounts collected exceeds $100.00, at which time the Department of Corrections shall remit that amount to this court . . . .

Although defendant filed an affidavit of indigency along with his request for an appointed appellate attorney, he has not contested his ability to pay the imposed fees. Thus, we resolve this issue as did *Jackson*:

> In this case, the trial court did not err by imposing the fee for his court-appointed attorney without conducting an ability-to-pay analysis. Further, it did not err by issuing the remittance order under MCL 769.1*l* because defendant is presumed to be nonindigent if his prisoner account is only reduced by 50 percent of the amount over $50. However, if he contests his ability to pay that amount, he may ask the trial court to amend or revoke the remittance order, at which point the trial court must decide whether defendant's claim of extraordinary financial circumstances rebuts the statutory presumption of his nonindigency. [*Jackson, supra*, 483 Mich at 298-299.]

Defendant also argues that the amount charged for attorney fees did not bear any relationship to the actual cost of attorney services in the case. Defendant cites no authority for this position, nor argues what a reasonable rate for this case would be. An appellant may not

merely announce a position and leave it up to this Court to discover the basis for the argument. *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

EXHIBIT L

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY ERIC GREEN,

Defendant-Appellant.

UNPUBLISHED
October 1, 2009

No. 284301
Washtenaw Circuit Court
LC No. 07-000941-FH

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and first-degree felony murder, MCL 750.316(1)(b). The court sentenced defendant to concurrent terms of life imprisonment without parole for the felony-murder conviction and 40 to 60 years' imprisonment for the CSC I conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the May 1983 murder of Laura Jean McBride, a 26-year-old Eastern Michigan University student. While fishing on May 24, 1983, two men discovered the victim's body in a wooded area of Ypsilanti, near the Huron River. Police noted that a lot of blood covered the victim's upper body, and that her pants had been pulled down. An autopsy of the victim documented that she had endured "[m]ultiple stab wounds to anterior neck, chest, abdomen, head, left buttock and right hand," one of which had severed her left jugular vein and also cut her left carotid artery. The police obtained oral, rectal and vaginal swabs during the autopsy, and initial testing of the vaginal swabs revealed the presence of spermatozoa. Although the police identified some potential suspects, not including defendant, the police did not locate a murder weapon or any other physical evidence strongly tending to incriminate anyone, and the case remained unresolved for two decades. In 2003, crime laboratory testing of the deoxyribonucleic acid (DNA) on the vaginal sample containing sperm identified a DNA profile that matched defendant's DNA profile, which was stored in an information database.

Defendant now challenges as insufficient the evidence supporting his convictions. Defendant emphasizes the absence of any other physical evidence or eyewitness testimony tending to link him to the victim's murder; defendant also stresses the lack of evidence of trauma to the victim's vagina, and avers that "[t]he presence of Mr. Green's semen in the decedent's vagina proves only that he had sex with her near the date of her death, which he readily admitted." This Court reviews de novo claims of insufficient evidence. *People v McGhee*, 268

Mich App 600, 622; 709 NW2d 595 (2005). Evidence sufficiently supports a conviction when "the evidence, viewed in a light most favorable to the people, would warrant a reasonable [fact finder] in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the . . . verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id.* at 400 (internal quotation omitted).]

"[A]n actor may be found guilty [of CSC I] under MCL 750.520b(1)(f) if the actor (1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration." *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). Force or coercion includes a circumstance in which the defendant "overcomes the victim through the actual application of physical force or physical violence." MCL 750.520b(1)(f)(i). To prove first-degree felony murder, the prosecution must establish 1) the defendant's killing of a human being, 2) while the defendant intended to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, and 3) while the defendant was committing, attempting to commit, or assisting in the commission of any specifically enumerated felonies, including CSC I. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

The trial court made the following relevant findings in rendering its verdict:

> The evidence at the scene as documented in the photographs of the condition of her body including the positioning of her clothing also establishes to me that she was penetrated and sexually assaulted at the same time in the woods where she was found. That's a crucial finding for me. The DNA evidence uncovered some twenty years later establishes beyond a reasonable doubt that the Defendant [sic] sperm was in the victim's vagina. There was no evidence of anyone else's sperm in the victim or anywhere else at the scene. The testimony of the Defendant, that he had consensual sexual intercourse with the victim at some previous day or weekend is inconsistent with the physical evidence at the scene and with the testimony of other witnesses concerning the character and habits of the victim. That testimony is not credible.
>
> I find beyond a reasonable doubt that the Defendant sexually penetrated [the victim] by force and coercion and while armed with a knife or similar sharp object, and resulting in severe injuries to her. I therefore, find the [Defendant] guilty of Criminal Sexual Conduct in the First Degree as alleged in Count III.
>
> I further find beyond a reasonable doubt that while in the perpetration of that sexual assault, the Defendant did murder [the victim] by repeatedly stabbing her with a knife or other similar object. I therefore find the Defendant guilty of Felony Murder as alleged in Count I.

Our review of the record reveals ample support for the trial court's findings. The evidence that the police discovered the victim lying in the woods on her back, covered in blood and with her pants pulled down around her knees, gives rise to a reasonable inference that someone sexually assaulted the victim at the same time they repeatedly stabbed the victim. The additional evidence of DNA linking the sperm recovered in the victim's vagina with defendant to a very high degree of probability, together with the absence of any suggestion of other potential sperm donors, tended to prove beyond a reasonable doubt defendant's identity as the sexual assailant and murderer of the victim. To the extent that the trial court specifically discredited defendant's explanation that he and the victim had engaged in sexual intercourse at some point well before her death, we will not revisit the court's credibility determination. *Nowack*, *supra*, 462 Mich 400. In conclusion, the evidence adequately supported beyond a reasonable doubt the trial court's findings that defendant penetrated the victim's vagina by applying force and causing her personal injury, MCL 750.520b(1)(f), and that defendant killed the victim "in the perpetration of . . . criminal sexual conduct in the first . . . degree." MCL 750.316(1)(b); see also *People v Ramsey*, 89 Mich App 260, 266; 280 NW2d 840 (1979) (in a felony murder case, rejecting the defendants' sufficiency challenge to the evidence of rape in light of evidence that "[t]he victim was found lying in an alley with her coat on. Her skirt was pulled up around her waist and her top was open. Her underwear had been pulled off . . . . And there was evidence of sexual intercourse.").

Defendant additionally submits that he did not receive a fair trial by an impartial fact finder in light of the trial court's longstanding affiliation with Eastern Michigan University, and the recent "inflammatory circumstances of the unrelated murder of . . . another EMU student . . . ." Defendant concedes that he did not object to the trial court's participation in his proceedings, and we thus review his bias and impartiality claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After reviewing the record, we have found no basis to find or even suspect that the trial court in presiding over defendant's trial possessed any actual bias under MCR 2.003(B) or that the court operated under an unconstitutional lack of partiality. With respect to the disqualification grounds enumerated in the Michigan Court Rules, defendant specifically cites only MCR 2.003(B)(5), which envisions judicial disqualification when "[t]he judge knows that he . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than a de minimis interest that could be substantially affected by the proceeding." However, defendant, who untimely raised his claim of bias, MCR 2.003(C)(1), has not made the requisite "showing of actual bias or prejudice." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). The facts that the trial court formerly occupied one of Eastern Michigan University's regent positions between 1987 and 1990, more recently applied for the university presidency, attended the university, and has an adjunct teaching position with the university fall far short of substantiating any actual bias. The university certainly does not constitute a party to this action, the trial court has no conceivable interest "in the [criminal] subject matter in controversy," and, viewed most charitably to defendant, the instant victim's identity as a university student does not even reach the level of a de minimis interest of the trial court that "could be substantially affected by" defendant's trial. Defendant plainly has failed to satisfy his burden to "overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

Regarding defendant's invocation of the Due Process Clause as a basis for judicial disqualification, "disqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain*, *supra*, 451 Mich 498. "The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where '*experience teaches us that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable*,'" for example when the judge "has a pecuniary interest in the outcome." *Id.* (emphasis in original). But, once again, the record remains entirely devoid of any evidence that the trial court possessed a direct, or even remote financial interest in the outcome of defendant's trial, notwithstanding the trial court-university connections noted above. Because the university was not a party to this case, the trial court's adjunct professorship does not even rise to a tenuous ground to warrant disqualification. *Olson v Olson*, 256 Mich App 619, 643; 671 NW2d 64 (2003).

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher

EXHIBIT M

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES STEPHAN ZIMMERMANN,

Defendant-Appellant.

UNPUBLISHED
April 27, 2010

No. 287895
Saginaw Circuit Court
LC No. 07-030108-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of aggravated stalking, MCL 750.411(i), extortion, MCL 750.213, attempted unlawful imprisonment, MCL 750.349(b), and felonious assault, MCL 750.82. Defendant was sentenced to concurrent terms of 24 months for aggravated stalking, 84 to 240 months for extortion, 24 to 60 months for attempted unlawful imprisonment, and 24 to 48 months for felonious assault. Defendant was given 253 days' credit against each sentence. Defendant appeals as of right, and we affirm.

A. SUBSTITUTION OF TRIAL JUDGE

Defendant argues that he is entitled a reversal of his conviction because Judge Leopold Borrello was substituted as his trial judge in violation of MCR 6.440(A) and established case law. Because defendant failed to object to Judge Borrello's substitution below, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Pursuant to MCR 6.440(A):

> If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial.

In the present case, defendant's jury trial began on June 18, 2008, with Judge Robert Kaczmarek presiding. Following the third day of trial, due to a family emergency that required Judge Kaczmarek to leave the state indefinitely, Judge Borrello was appointed as a substitute judge. On June 25, 2008, Judge Borrello filed a certification that he had familiarized himself

with the record as required by MCR 6.440.[1] Prior to the start of the fourth day of trial, Judge Borrello, on the record, informed plaintiff and defendant of Judge Kaczmarek's situation and assured them that he had read the transcripts and some of the motions and that he was confident the case could proceed.

First, defendant argues that he is entitled to a new trial because Judge Borrello did not inform the parties of their options before proceeding with the trial, which defendant believes was either to proceed with the trial or have a mistrial declared. However, the plain language of MCR 6.440(A) does not require that the parties consent before the appointment of a substitute judge or before that judge can proceed with the trial. Nor does it require that the parties be offered any options in lieu of proceeding before the substitute judge. Rather, the plain language of the rule requires only that the prospective substitute judge certify that he or she has familiarized himself or herself with the record and before proceeding with the trial. MCR 6.440(A).[2] Judge Borrello fully complied with the court rule.

Defendant's second argument is that Judge Borrello's substitution entitles him to a new trial because it was contrary to the "general rule" identified in *People v McCline*, 442 Mich 127, 133; 449 NW2d 341 (1993). In that case, our Supreme Court quoted the dissenting opinion in *People v McCline*, 197 Mich App 711, 719-720 (JANSEN, J., dissenting); 496 NW2d 296 (1992), overruled in part by *McCline*, 442 Mich at 127, at length as follows:

> The general rule is that it is error requiring reversal to substitute a judge to preside over the remainder of a trial in which evidence was adduced while the original judge was presiding.
>
> The theory behind the general rule is that the second or substitute judge, not being familiar with the prior testimony or evidence, is not in a position to give the accused a fair and impartial trial as contemplated under the law. The only judge competent to instruct the jury is the one who heard the testimony, observed the demeanor of the witnesses and had an opportunity to form an opinion with respect to their credibility, and knows something about the "atmosphere" of the case. Another judge, without knowledge of such matters taking place during the trial and with no possibility of learning from the record all the attendant circumstances of the trial, is not qualified to properly charge the jury. [Internal citations omitted.].

While the facts of the instant case fall squarely within the general rule prohibiting the

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[1] Defendant's assertion that there was no certification is belied by the record, as the prosecutor attached to his appeal brief a copy of the filed certificate.

[2] Defendant's reliance upon *People v Hicks*, 447 Mich 819 (opinion by Griffin, J.); 528 NW2d 136 (1994), is misplaced. *Hicks* involved the substitution of the judge presiding over two bench trials. *Id.* at 823. As such, the applicable court rule to that case was MCR 6.440(B), not MCR 6.440(A), which is the applicable court rule in the instant case. MCR 6.440(B). Therefore, *Hicks* in not controlling, and accordingly, does not support defendant's argument.

substitution of a judge after jury selection and the presentation of evidence, *McCline*, 442 Mich at 133, *McCline* was not based on MCR 6.440(A). Indeed, the court rule did not exist at the time of the trial in *McCline*. And, even if there was lack of compliance with the court rule, "automatic reversals are not favored . . . ." *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). Instead, the Legislature and the courts require a showing of actual prejudice before a party is entitled to reversal. MCL 769.26; MCR 2.613(A). In other words, if the court rule violation was harmless error, reversal is not required. *Bell*, 209 Mich App at 275. Any error in this case would have been harmless, and defendant has not shown that he was actually innocent or that any error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Third, the order assigning Judge Borrello as a substitute judge reflects that Judge Borrello was a visiting judge to the circuit. If it is, as defendant asserts, "unknown if the State Court Administrator properly assigned Judge Borrello to serve on this case or to serve in general in Saginaw County," any lack of clarity is the consequence of the matter not being timely raised below. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter,* 222 Mich App 513, 537; 564 NW2d 532 (1997).

B. MOTION TO QUASH AND DIRECTED VERDICT

Defendant argues that his due process rights were violated when the trial court denied his motion to quash the extortion charge. However, where the prosecutor presents evidence sufficient to prove defendant guilty at trial beyond a reasonable doubt, any error in the bindover is harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

MCL 750.213 states in relevant part:

> Any person who shall . . . orally or by a written or printed communication maliciously threaten any injury to the person . . . with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony . . . .

The testimony established that defendant approached the victim with a crowbar in his hand and told her that he had it to make sure that she did not leave before he had finished talking to her. Although defendant did not specifically state what he would do with the metal crowbar if the victim did not comply with his request, given the nature of the object and the stated reason why he had it readily available, the possibility of physical injury to the victim was real. Based on the record, there was sufficient evidence for the jury to conclude that defendant impliedly threatened to injure the victim, and that defendant made that threat with the intent to compel the victim from doing an act, i.e., leaving the parking lot before he had finished talking to her against her will. Defendant's argument therefore fails.

C. CHALLENGES FOR CAUSE AND THE JURY ARRAY

Defendant argues that the trial court abused its discretion when it excused four prospective jurors for cause merely because the prospective jurors had been previously convicted of misdemeanor offenses. We disagree. Because defendant failed to raise this issue below, it

has been forfeited and our review is, therefore, only for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Generally, it is within the trial court's discretion whether to excuse a prospective juror for cause. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004). However, "once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *Id.* The record reflects that the prosecutor challenged for cause the objected to jurors based on their criminal records pursuant to MCR 2.511(D)(10). As such, the trial court was without discretion to excuse the prospective jurors. *Id.*

Defendant also argues that the trial court's dismissal of the four prospective jurors was in error because they had been convicted of misdemeanors deprived him of his constitutional right to a fair and impartial jury. We review this unpreserved claim of systematic exclusion for plain error affecting substantive rights. *Carines*, 460 Mich at 763; *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003).

Criminal defendants are constitutionally entitled to an impartial jury that is drawn from a fair cross-section of the community. *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975).

> [T]o establish a prima facie violation of the fair cross-section requirement, a defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant has presented no case law or evidence to support his argument that persons with a criminal record are considered a distinctive group. It is only a violation of the "fair cross-section" requirement if the group excluded is a distinct group in the community, *Duren*, 439 US at 364, so defendant's argument fails.

D. EVIDENTIARY ISSUES

Defendant also argues that the trial court's failure to admit evidence that the victim had previously opened fraudulent bank accounts in someone else's name deprived him of his right to present a defense. According to defendant, because the evidence was admissible to show the victim's motive to lie and make false allegations against him, the trial court abused its discretion when it excluded the evidence at trial. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo whether a defendant has been deprived the right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The trial court did not abuse his discretion when holding that the bank records were inadmissible. Although a witness's credibility is always relevant and a party is entitled to introduce evidence assailing witness credibility, a party does not have an absolute right to introduce every piece of evidence that might bear on a witness's credibility. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). "[T]he test is 'whether the evidence will aid the court or jury in determining the probative value of other evidence *offered to affect the probability of the existence of a consequential fact.*'" *Id.*, quoting Weinstein & Berger, Evidence, ¶ 401[05], p 401-29 (emphasis by *Mills* Court). Even if the victim had opened up a fraudulent bank account in someone else's name, given the lack of any connection to the instant case or her relationship with defendant, the evidence would have a limited value, if any, in helping the jury determine the probative value of the other evidence offered at trial. Nor would such evidence have a tendency to show the victim had a motive to file false allegations against defendant, which is what defendant argues was the relevance of the evidence.

Defendant also argues that the trial court abused its discretion and deprived him of his right to present a defense when it excluded his alibi witness's bank records. The record reflects that while the trial court considered whether to admit defendant's alibi witness's bank records, it reserved its ruling on the matter until defendant actually sought to introduce the records. Our review of the record reflects that defendant did not make such an attempt. Thus, any error in the failure to admit the records cannot be attributed to the trial court.

Next, defendant argues that the trial court abused its discretion when it allowed the prosecutor to admit a letter allegedly written by defendant without proper authentication. It is a prerequisite to the admission of evidence that the party attempting to introduce the evidence prove its authenticity. MRE 901(a). MRE 901(b) states in relevant part as follows:

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.
>
> * * *
>
> (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.

Defendant's argument that because no witness familiar with defendant's handwriting testified that he wrote the letter, the trial court could not find that the letter had been properly authenticated is erroneous. A plain reading of MRE 901(b) reflects that there are numerous ways in which a document can be authenticated. Having reviewed the record, we agree with the trial court's findings that the letter had distinctive characteristics that suggested it was what the prosecutor purported it to be.

Defendant also argues that the trial court abused its discretion when it admitted the letter because the prosecutor had failed to establish a chain of custody. Even if we were to agree with defendant, it is well settled that gaps in chain in custody go to the weight afforded the evidence, not its admissibility. *People v White*, 208 Mich App 126, 132; 527 NW2d 34 (1994); see also *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991) (stating that "[i]t is axiomatic that proposed evidence . . . need [not] be free of weakness or doubt. It need only meet the minimum requirements for admissibility. Beyond that our system trusts the trier of fact to sift through the evidence and weigh it properly."). We see no error requiring reversal.

E. PROSECUTORIAL MISCONDUCT

Defendant argues that he was deprived of his right to a fair trial when the prosecutor made several misstatements of the evidence during his opening statements. Again, we disagree. To the extent that defendant preserved this issue for appeal, we review his arguments de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). We review defendant's unpreserved claims for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Contrary to defendant's argument, the challenged comments made by the prosecutor during opening statements were proper based on expected testimony. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). The record reflects that, with the exception of the prosecutor's statements that defendant tried to suffocate the victim and that he had cracked the victim's e-mail account passwords, the prosecutor elicited testimony that supports the statements made during his opening. And even though there was no direct testimony that defendant either tried to suffocate the victim or cracked the victim's email accounts, it can be inferred from the victim's testimony that defendant might have done so. As for the former, the victim testified, "We had sex. And while he was laying on top of me he covered my mouth." The prosecutor cannot be faulted if the witness gave a less detailed answer that he was expecting. *Id.* Further, the jury was instructed that attorneys' statements were not evidence and could not be considered when deciding defendant's guilt. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that he was denied a fair trial when the prosecutor introduced other acts evidence without providing proper notice pursuant to MRE 404(b). During direct examination, the prosecutor elicited testimony from the victim that defendant had told her that she had AIDS because she had had an affair with another man. Given the context of the victim's testimony, defendant's comment would constitute a prior statement, not a prior act. Only testimony regarding other acts must meet the requirements of MRE 404(b). *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1998); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989). Accordingly, the admissibility of defendant's statement was governed by general relevancy principles. Defendant does not argue that the testimony was otherwise inadmissible.

Lastly, defendant argues that his trial counsel was ineffective for failing to object to the aforementioned statements and conduct. Because the prosecutor's statements and questions were not improper, defendant's trial counsel was not ineffective for failing to object below. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

F. CUMULATIVE ERRORS

Defendant argues that the cumulative effect of the errors below deprived him of a fair trial. Because defendant has not demonstrated that any errors were committed at his trial, he is not entitled to relief. *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008).

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

EXHIBIT N

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LAWRENCE BECKTEL,

Defendant-Appellant.

UNPUBLISHED
March 4, 2010

No. 289533
Washtenaw Circuit Court
LC No. 08-000347-FC

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83. The trial court sentenced defendant to 15 to 40 years in prison. Defendant appeals as of right. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecuting attorney presented evidence that, in February 2008, in the City of Saline, defendant, in a drunken frenzy, stabbed the victim repeatedly with a knife, causing numerous wounds and copious loss of blood.

At the start of jury selection, the trial court admonished the prospective jurors that "[j]ury duty is one of the most serious duties that members of a free society are asked to perform," and added, "[t]he Jury is an important part of this Court." The court went on to swear the array to answer "truthfully, fully and honestly" all the questions they might be asked in the selection process. When the jury was selected and impaneled, however, the court administered no additional oath to the jurors. At the close of proofs, the trial court instructed the jury, incorrectly, that it had taken an oath to "return a true and just verdict based only on the evidence and my instructions on the law." The court went on to instruct the jury on its duties, how to interpret the evidence, and the applicable law.

Defendant's sole issue on appeal is whether the lack of an oath to return an honest verdict based on law and evidence, as should have been administered between jury selection and before trial, rendered his conviction invalid. We hold that it did.

We review a trial court's conduct at trial for an abuse of discretion. See *People v Ramano*, 181 Mich App 204, 220; 448 NW2d 795 (1989). However, as defendant admits, neither party nor the court noted, or expressed concerns over, the failure of the court to put the

jurors under oath or affirmation concerning how they were to hear and decide the case. This issue thus comes to this Court as an unpreserved one.

A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

MCL 768.14 decrees that jurors in criminal cases be sworn to "well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state . . . ." MCL 768.15 in turn authorizes use of secular affirmations, with references to the pains and penalties of perjury, in place of religious language.

MCR 2.511(H) prescribes an oath or affirmation whereby the jurors solemnly swear or affirm that they will "justly decide the questions submitted" and "render a true verdict . . . only on the evidence introduced and in accordance with the instructions of the court . . . ." MCR 6.412(F) in turn requires that jurors be sworn "[a]fter the jury is selected and before trial begins."

In light of these authorities, there can be no doubt that the failure to administer an oath or affirmation concerning the jurors' duties in deciding the case was plain error. Also, the case law makes plain that such error is of grave significance and is the sort of error that seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *Carines*, 460 Mich at 763.

> The required oath is not a mere "formality" which is required only by tradition. The oath represents a solemn promise on the part of each juror to do his duty according to the dictates of the law to see that justice is done. This duty is not just a final duty to render a verdict in accordance with the law, but the duty to act in accordance with the law at all stages of trial. The oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times as befits one holding such an important position. The oath is designed to protect the fundamental right of trial by an impartial jury. [*People v Pribble*, 72 Mich App 219, 224; 249 NW2d 363 (1976).]

Accordingly, "[a]ll the authorities agree that the failure to take this oath . . . in substantially the form prescribed by law renders all the proceedings invalid . . . ." *Id.* at 225 (internal citation and quotation marks omitted).

In *People v Clemons*, 177 Mich App 523, 528; 442 NW2d 717 (1989), this Court held that the verdict in a criminal case was invalid because the jury was not properly impaneled and sworn in. That case concerned ten jurors who were properly sworn in for an earlier trial that ended in a mistrial, then immediately served in the retrial without being sworn in anew. *Id.* at 529. Because the earlier mistrial wholly voided the attendant proceedings, the earlier oath could not carry over to the new trial. *Id.* at 529-530. The holding in *Clemons* well underscores the

importance of having the jurors hear the entire case while under the most solemn oath or affirmation to decide the case honestly, on the basis of the evidence, and in accord with the law.

Plaintiff points out that the prospective jurors took an oath at the beginning of jury selection. However, that was an oath to answer truthfully the questions asked of them during the selection process. That was no substitute for the required oath or affirmation relating to their duties in hearing and deciding the case.

Because defendant was convicted on the basis of a verdict from a jury that never received the oath or affirmation that must be administered between jury selection and the start of trial, we must reverse that conviction in recognition of the need to preserve the fairness, integrity, and public reputation of our judicial proceedings. See *Carines,* 460 Mich at 763; *Clemons*, 177 Mich App at 529-530; *Pribble*, 72 Mich App at 225.

Because the failure to administer the oath to the impaneled jury rendered the proceedings, and result, wholly invalid, jeopardy did not attach. See *Pribble*, 72 Mich App at 229-230. Accordingly, retrial is not barred by principles of double jeopardy. *Id.* We therefore remand this case to the trial court for retrial.

Reversed and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray